

If Your Return Preparer E-Files Your Return Late, You Can Be Hit with Late Filing and Late Payment Penalties

by Robert S. Horwitz

Taxpayers are required to file their tax returns by the due date. They cannot delegate that duty to an accountant, attorney, or other agent. They cannot rely on an agent's statement that an extension to file has been obtained. A taxpayer cannot avoid a late filing or late payment penalty because the accountant failed to send the return in on time. This was the teaching of *United States v. Boyle*, 469 U.S. 241 (1985), where the Supreme Court upheld failure to file penalties against an executor who relied on the estate's attorneys to prepare and file an estate tax return on time.

Boyle was decided prior to the era of electronically filed ("e-filed") returns, when tax returns were paper and were sent to the IRS by snail mail or hand delivery. Those days are long gone. For most returns, Congress, Treasury and the Internal Revenue Service have been encouraging taxpayers to e-file their income tax returns for more than a decade and currently over 90% of income tax returns are e-filed. A tax return preparer whose firm files more than 10 income tax returns a year is required to e-file the returns. Taxpayers who use a paid return preparer are required to sign an IRS e-file Signature Authorization (Form 8879) stating, under penalties of perjury, that they have examined the return, that to the best of their knowledge it is true and correct and that they consent

to allow my intermediate service provider, transmitter, or electronic return originator (ERO) to send my return to the IRS and to receive from the IRS (a) an acknowledgement of receipt or reason for rejection of the transmission, (b) the reason for any delay in processing the return or refund, and (c) the date of any refund.

Do you expect that a taxpayer who goes to a paid return preparer would be relieved of penalties if the return preparer files the return late? If you do, you're wrong. According to the 11th Circuit Court of Appeals, using a return preparer will not relieve you of late filing and late payment penalties, as the taxpayer found out in *Lee v. United States*, 2023 WL 6979257 (11th Cir. 2023).

The plaintiff in *Lee* is a surgeon in Florida who hired a CPA to prepare and file his 2014, 2015, and 2016 income tax returns. For the three years, Lee made estimated tax payments of over \$1.6 million. Lee provided the CPA with all

necessary documents and the CPA prepared the returns prior to the due dates. Lee reviewed the returns, signed the Forms 8879 authorizing the CPA to submit his returns to the IRS and assumed that the returns were filed by the CPA. Lee's 2014 return reported an overpayment of just over \$288,000, which he elected to apply to his 2015 return. The 2015 return reported an overpayment that he elected to apply to his 2016 return.

There was one major problem: the CPA failed to e-file the returns with the IRS. He also failed to inform the IRS that Lee had a new mailing address, even though he told Lee he had done so, and he failed to inform Lee that the returns had not been filed. Since the CPA failed to inform the IRS of Lee's new mailing address, Lee never received any notices from the IRS that he had not filed his returns. Lee first learned about his CPA's dereliction in late 2018, more than three years after the due date for the 2014 return, when he was visited by an IRS agent. In December 2018, Lee filed his returns for 2014, 2015, and 2016, claiming the \$288,000 carryover from 2014 to 2015 and 2016. The IRS disallowed the carryover of the overpayment and Lee had to pay \$289,000 in tax, penalties, and interest, including \$70,000 in late filing and late payment penalties.

Lee sued the CPA and the CPA's firm and in 2020 settled the case. He then sued the Government for a refund of the penalties. The district court granted summary judgment in favor of the Government and Lee appealed to the 11th Circuit, arguing that he had reasonable cause for not filing or paying on time because he relied on his CPA to e-file.

On the first page of its opinion the 11th Circuit noted that no appellate court had addressed the issue of whether *Boyle* applies to e-filed returns and immediately gave away the punch line: "We believe it does. Accordingly, we conclude that Lee's reliance on his CPA does not constitute 'reasonable cause' under Section 6651(a)(1)."

Section 6651(a)(1) imposes a penalty for late filing of a return. The penalty is equal to 5% of the tax shown due on the return that is not paid for each month or fraction thereof that the return is not filed, up to a maximum of 25%. Section 6651(a)(2) imposes a penalty for failing to pay tax shown due on a return. A taxpayer is not liable for either penalty if it is established that the failure was due to reasonable cause and not willful neglect. To do this, it must be established that

“the taxpayer exercised ordinary business care and prudence” but was still unable to file the return or pay the tax on time. Treas. Reg. sec. 301.6501-1(c)(1).

Lee made three arguments as to why he was entitled to a refund: (a) *Boyle* didn't apply to e-filed returns; (b) regardless of *Boyle*, he showed reasonable cause for the late filing; and (c) the penalties didn't apply since he had paid the tax shown due on his returns. The 11th Circuit didn't buy any of Lee's arguments.

Concerning the applicability of *Boyle* to e-filed returns, the Court noted that *Boyle* adopted a bright line test that failure to file is not excused by the taxpayer's reliance on an agent. The Form 8897 authorizes the ERO (in this case Lee's CPA) to electronically submit the return to the IRS as soon as possible after the taxpayer signs the form, but in no less than three days after signing. Signing the Form 8897 is not the same as filing a return. The Court noted that after signing Form 8897 Lee “still had a duty to supervise [the CPA's] ... tax preparation and to ensure his tax return had been submitted.”

The Court found Lee's reliance on footnote 6 of *Boyle* (that an event beyond the taxpayer's control can excuse late filing) misplaced. The footnote concerned events such as illness or a delay in the mails, which was not what happened to Lee. Like the taxpayer in *Boyle*, Lee's excuse was that he relied on an agent. This did not result in Lee no longer having the ability to ensure that his returns were filed. Lee still had a duty to file his returns on time.

The Court was not persuaded that in encouraging e-filing Congress shifted the burden of e-filing to return preparers so that Lee could not be penalized for his CPA's defalcation. Despite delegating tax preparation and filing to the CPA, Lee still retained full control: first, Lee could have prepared and filed the returns himself; second, he could have had the CPA print out the returns, signed them and filed them with the IRS. IRS publications and forms about e-filing that Lee relied on do not overturn Supreme Court precedent and those forms underscore that a return is not considered filed until it is accepted by the IRS. While Lee's CPA breached his duties to his client, this does not extinguish Lee's “unambiguous, precisely defined duty to file” timely returns. The e-filing regulations state that having a return preparer e-file “do[es] not alter or affect a taxpayer's obligation to file returns under any other provision of law.” 26 C.F.R. § 301.6011-7(a)(4)(iii).” Since *Boyle* applies to e-filed returns, Lee failed to establish reasonable cause.

To support his second argument, that regardless of *Boyle*, he exercised

ordinary business care and prudence, Lee pointed to his hiring a CPA, reviewing his returns, signing Form 8879 and overpaying his tax for 2014. The Court stated that e-filing does not alter the reasonable cause analysis of *Boyle*. The duty to file the return is that of the taxpayer, not of the agent, “and it remains invariable whether e-filing or paper filing.” While Lee exercised some diligence in having his returns prepared, reviewing them and signing Form 8879, this was not enough.

Because Lee did not file his 2014 return until December 2018, under section 6511(b)(2)(A) he could not claim credits for the overpayment for 2014 which was made on April 15, 2015. Lee was thus liable for tax for 2015 and 2016 and penalties. Just as he failed to establish reasonable cause for failing to file on time, he did not have reasonable cause for failure to pay.

Judge Lagoa concurred in the majority opinion but wrote separately “to highlight the risks facing taxpayers who rely on their accountants to e-file their returns.” According to the IRS 2022 databook, 89.5 million individual income tax returns were filed by paid return preparers, and 93.8% of all individual income tax returns were e-filed. After signing Form 8879, “a taxpayer would expect that the simple act of filing the tax return would be completed quickly and without issue.” Lee’s case exemplifies that taxpayers must understand (but probably do not) that signing Form 8879 does not relieve them of liability for penalties if the return preparer does not file the return on time. To avoid penalties, taxpayers should confirm independently with the IRS that it has received the return or can elect to file the return on paper. The concurring opinion concludes:

As the majority notes, the legal obligation on taxpayers here is a heavy burden that can lead to unintended financial consequences for a taxpayer if not complied with, even if the taxpayer assumes that their tax professional will timely file their tax returns. Taxpayers need to fully understand both the hidden dangers and available protections when relying on an agent to file their tax returns, and accountants and other professional tax preparers should advise their clients of taxpayers’ responsibilities to ensure the submission of their returns regardless of their reliance on an agent.

The result is unduly harsh and contrary to current tax policy as recently exemplified by Treasury’s press release on the IRS’s achieving goals in its Paperless Filing Initiative. See, <https://home.treasury.gov/news/press->

releases/jy1890. The *Lee* case is unusual in that it involves a taxpayer with the financial wherewithal to pursue litigation. Most do not. While the IRS Databook publishes statistics on the total number and amount of penalties assessed for different categories of returns, it does not distinguish delinquency penalties assessed for late filing and those assessed for late payment, nor does it distinguish between penalties for returns e-filed by paid return preparers and penalties for returns filed by the taxpayer.

Given Congress's and the IRS's continued efforts to get more people to e-file their returns and the number of people who use paid return preparers, including in lower-income and immigrant communities, there is an easy fix for this harsh result: amend the e-filing regulations to deem the date the taxpayer signed the Form 8879 as the date of filing and require the return preparer to e-file the Form 8879 with the return. This way, a taxpayer who signed the Form by the due date would not be penalized if the return preparer does not e-file the return on time,

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